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# ENEMY COMBATANTS AND DUE PROCESS: THE JUDICIARY'S ROLE IN CURBING EXECUTIVE POWER

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"The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>1</sup>

## INTRODUCTION

In response to the terrorist attacks of September 11, 2001, the Executive branch launched a global 'war on terror' aimed at dismantling global terrorist cells and protecting the United States from further attacks. In the days following September 11, President Bush declared a state of national emergency and, in his capacity as Commander in Chief, dispatched United States military troops to Afghanistan, whose Taliban government was known to shelter Al Qaeda, the terrorist network claiming responsibility for the attacks.<sup>2</sup> Congress then issued an authorization for the President to "use all necessary and appropriate force" against organizations or nations who aided in the September 11 attacks, and recognized the President's "authority under the Constitution to take action to deter and

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<sup>1</sup> THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1961) (expressing Founders' view of need for separation of powers).

<sup>2</sup> Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001) (announcing intent to act pursuant to statutory authorization in the event of national emergency); see Charles I. Lugini, *Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 227 (2003) (describing President's escalating rhetoric against terrorists in support of military action).

prevent acts of international terrorism against the United States.”<sup>3</sup>

Since the military occupation of Afghanistan began, thousands of individuals suspected of alignment with terrorist networks have been taken into custody of the U.S. military. Initially it was determined that of those taken into custody, the American citizens captured either at home or abroad and foreign nationals captured within U.S. borders would be tried in the regular court system.<sup>4</sup> However, in response to the government's expenditure of considerable resources in developing these federal cases coupled with the growing concern over intelligence exposure, the Executive branch began putting those captured into military brigs for indefinite imprisonment without access to counsel.<sup>5</sup> The

<sup>3</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

PL 107-40 provides:

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, . . .

In General.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.*

<sup>4</sup> Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 788 (2003) (explaining that John Walker Lindh, an American citizen, was charged in federal court, whereas Yassar Hamdi and Jose Padilla, also American citizens, have been detained in naval brigs); see John Lichtenthal, Note, *The Patriot Act and Bush's Military Tribunals: Effective Enforcement or Attacks on Civil Liberties?*, 10 BUFF. HUM. RTS. L. REV. 399, 415 (2004) (pointing out differences in treatment between Americans citizens).

<sup>5</sup> See Kelly, *supra* note 4, at 788 (offering explanation for government's change in tactics); see also Lugosi, *supra* note 2, at 230 (noting that after American citizenship of a Guantanamo Bay detainee was discovered, he was removed to a naval brig).

justification for this treatment is that these prisoners have been designated "enemy combatants" by the Justice Department.<sup>6</sup>

The term 'enemy combatant' derives from the Supreme Court case *Ex parte Quirin*,<sup>7</sup> where the Court ruled that Americans assisting Nazis in destroying U.S. industrial targets could be tried in military commissions instead of civilian courts.<sup>8</sup> Even though at least one of the defendants asserted his American citizenship and the civilian courts were open, President Roosevelt designated the defendants, who were mostly German citizens, "unlawful combatants" and determined that they should be tried in military tribunals.<sup>9</sup> Although the Court did not accept the government's argument that the actions of the President were not subject to judicial review, the Court did affirm the President's action as well as features of the military tribunals that disregarded Fifth and Sixth Amendment rights for the defendants, including the defendant American citizen.<sup>10</sup> The government relies on this case as authority for justifying its policy of indefinite detention for the current 'enemy combatants,'<sup>11</sup> even though *Quirin* is highly criticized and often categorized along side other notorious Supreme Court decisions such as *Plessy v. Ferguson*,<sup>12</sup> *Dred Scott v. Sandford*,<sup>13</sup> and *Korematsu v. United States*.<sup>14</sup>

<sup>6</sup> See Kelly, *supra* note 4, at 794 (listing two citizens who have been labeled 'enemy combatants'); see also Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 939-40 (2003) (stating that United States uses label 'enemy combatant' in order to detain suspected wrongdoers).

<sup>7</sup> 317 U.S. 1 (1942) (involving German-born saboteurs).

<sup>8</sup> See *Ex parte Quirin*, 317 U.S. 1, 37-40 (1942) (presenting rationale against 'enemy belligerents'); see also Swanson, *supra* note 6, at 953 (explaining Court's reasoning in sanctioning a military commission in which to try saboteurs).

<sup>9</sup> *Quirin*, 317 U.S. at 35 (recognizing government's designation of 'unlawful combatant'); see Swanson, *supra* note 6, at 951 (giving history of President Roosevelt's actions toward the detained men).

<sup>10</sup> See *Quirin*, 317 U.S. at 45 (concluding that Fifth and Sixth Amendments placed no restrictions on authority to try offenses in this case); see also Swanson, *supra* note 6, at 955 (explaining Court's refusal to treat alleged American citizen differently than other 'unlawful combatants').

<sup>11</sup> See Kelly, *supra* note 4, at 798 (relating government's reliance on *Quirin*); see also Ingrid Brunk Wueth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 307 (2005) (explaining Court's acceptance of the government's reliance on *Quirin*).

<sup>12</sup> 163 U.S. 537 (1896).

<sup>13</sup> 60 U.S. 393 (1856).

<sup>14</sup> 323 U.S. 214 (1944); see Kelly, *supra* note 4, at 798 (lumping in *Quirin* with *Plessy*, *Dred Scott*, and *Korematsu* as disfavored cases).

The criteria for classification of a detainee as an "enemy combatant" is kept secret by those responsible for making the determination, namely the Attorney General, the Secretary of Defense, and the CIA director.<sup>15</sup> As Solicitor General Ted Olsen explains about the enemy combatant distinction, "[t]here will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances."<sup>16</sup> This elusive definition results in the indefinite detention of a diverse pool of defendants and has presented the courts with significant problems in delineating the authority of the Executive and balancing national security interests against the Constitutional rights of the accused.<sup>17</sup>

In each case, ranging from American citizens captured abroad<sup>18</sup> to foreign citizens captured in the U.S.,<sup>19</sup> the government justifies its detention policies with national security interests and argues that separation of powers precludes the courts from forcing the government to justify its enemy combatant classification.<sup>20</sup> This argument is not unique to the

<sup>15</sup> See Kelly, *supra* note 4, at 797 (stating who determines which detainees are 'enemy combatants'); see also Lugosi, *supra* note 2, at 228 (noting executive's secrecy over how to define 'enemy combatant').

<sup>16</sup> Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated 'Combatants' Lose Legal Protections*, WASH. POST, Dec. 1, 2002, at A1 (stating executive branch's argument that it need not define criteria for classifying 'enemy combatants').

<sup>17</sup> See Lugosi, *supra* note 2, at 228–29 (expressing concern over executive power that has been enhanced by lack of definite information); see also Abner Mikva, *Dangerous Executive Power*, WASH. POST, July 16, 2004, at A21 (worrying about possibilities for executive abuse).

<sup>18</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004) (plurality opinion) (involving citizen-detainee who allegedly took up arms with the Taliban and was captured in Afghanistan); see also *U.S. v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D.Va. 2002) (explaining case of American citizen who attended a military training camp and joined foreign terrorist organizations in Afghanistan to combat the Northern Alliance and American forces and was captured abroad in November 2001).

<sup>19</sup> See, e.g., *U.S. v. Moussaoui*, 382 F.3d 453, 457–58 (4th Cir. 2004) (highlighting legal situation faced by Zacarias Moussaoui, the so-called 20th hijacker who was prevented from participating in the September 11th terrorist attacks in America because he was arrested in mid-August 2001 for an immigration violation); see also *Ex parte Quirin*, 317 U.S. 1, 22–25 (1942) (positing that perhaps the president's power over enemies who enter the country in times of war as armed invaders intending to commit hostile acts must be absolute).

<sup>20</sup> See generally Frank Dunham, *When Yasir Esam Hamdi Meets Zacarias Moussaoui*, 4 RICH. J. GLOBAL L. & BUS. 21, 27 (2004) (explaining government's reasoning in *Hamdi* and *Moussaoui* and concluding that ultimately government relies on separation of powers as basis for its arguments); see also Kelly, *supra* note 4, at 788–89 (reasoning that in the aftermath of the September 11th terrorist attacks, in an effort to maintain national security, the government "demonstrated its zealous intent to pursue those responsible for

present situation, as it often resurfaces when the scope of the Executive's power is questioned in the context of providing for national security.<sup>21</sup> The current situation and the 'War on Terror,' in which boundaries are blurred and enemies are undefined, present particular challenges to the judiciary in determining the Constitutional confines of the Executive's war-making powers.<sup>22</sup>

### A. Historical Background

The concept of separation of powers among different governmental bodies was articulated before the Constitution,<sup>23</sup> adopted by the Framers,<sup>24</sup> and has consistently been reaffirmed by the Supreme Court as essential to the preservation of American liberty.<sup>25</sup> Articles I, II, and III of the U.S. Constitution

the attacks by altering constitutional and legal checks on its power where possible and violating other constraints where necessary").

<sup>21</sup> See Dunham, *supra* note 20, at 21–24 (outlining a trend in this country to take actions in times of war in the name of national security that we later “decry and discredit”); see also Lane, *supra* note 16, at A1 (discussing hotly disputed contention that the President has power to declare an individual an enemy combatant in the name of national security and that such a tag allows the President to detain the individual until he determines that hostilities between the United States and that individual have ended).

<sup>22</sup> See Dunham, *supra* note 20, at 24–26 (commenting that regulations surrounding detention of “enemy combatants” cause a great amount of public discomfort because they can be construed as exemplifying the current administration’s disregard for civil liberties); see also Kelly, *supra* note 4, at 795–97, 806–07 (noting that “the constitutional allocation of war powers affords the president extraordinarily broad authority as commander in chief and compels courts to assume a deferential posture in reviewing exercises of this authority” and further explaining that “[t]he safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict”).

<sup>23</sup> See MONTESQUIEU, THE SPIRIT OF THE LAWS 221–37 (Thomas Nugent trans., 1949), available at <http://www.fordham.edu/halsall/mod/montesquieu-spirit.html> (explaining idea that different branches of power can exist within a single government); see also Calvin H. Johnson, *Homage to Clio: The Historical Continuity From the Articles of Confederation into the Constitution*, 20 CONST. COMMENTARY 463, 472–73 (2004) (tracing history of the Constitution as derived from Articles of Confederation; commenting that many parts of the constitution are in fact “borrowed and carried forward from the text of the Articles of Confederation”).

<sup>24</sup> See *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (noting that separation of powers principle was incorporated into U.S. Constitution); see also *INS v. Chadha*, 462 U.S. 919, 946 (1983) (stating that structure of Constitution as three separate articles exemplifies the concept of separation of powers).

<sup>25</sup> See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (reaffirming the principle that separation of governmental powers is essential to preservation of American liberty); see also *Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (maintaining that three general departments of government entirely free from control or influence of other departments are fundamentally necessary in this country and are described as such in the Constitution).

specifically construct and designate powers to each respective branch.<sup>26</sup>

The power to declare and fight wars for the nation's defense is necessary for the preservation and strength of a national government. Under the Constitution, this power is specifically vested in the federal government.<sup>27</sup> However, it is not vested solely in one branch of government; rather, the federal government's war-making powers are divided among the Congress and the Executive.<sup>28</sup> The Constitution specifically vests the President with the "Executive power" and designates him Commander in Chief of the armed forces.<sup>29</sup> The Congress is empowered with the authority to provide for the common defense, raise and support armies, and declare war.<sup>30</sup> Under their constitutional construction, the Executive and Legislative branches are capable of taking quick military action: as an individual, the Executive is capable of making immediate decisions, while the Congress has the ability to convene and declare war within a matter of hours.<sup>31</sup> The third branch of the

<sup>26</sup> See U.S. CONST. art. I, § 8, cl. 1–18 (delineating powers granted by the Constitution to Congress and stating that Congress shall consist of a Senate and a House of Representatives); U.S. CONST. art. II (listing executive branch's powers and vesting them in the President); U.S. CONST. art. III (explaining powers granted to judiciary branch).

<sup>27</sup> See U.S. CONST. pmb. ("We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, *provide for the common defense*, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.") (emphasis added); see also U.S. CONST. art I, § 8, cl. 1 (vesting the power to "provide for the Common Defense and general Welfare of the United States" in the Congress of the United States).

<sup>28</sup> U.S. CONST. art I, § 8, cl. 11 (granting Congress the power to "declare War, grant letters of Marque and Reprisal, and make rules concerning Captures on Land and Water"); U.S. CONST. art II, § 2, cl. 1 (designating the President "Commander in Chief of the Army and Navy of the United States . . .").

<sup>29</sup> See U.S. CONST art II, § 2, cl. 1 (mandating that the Executive power shall be vested in the President and explaining that the President shall be considered Commander in Chief of the Army and Navy, and of the militia of the several states); see also Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENTARY 87, 95–96 (2002) (stating that the Constitution vests President with "executive power").

<sup>30</sup> See U.S. CONST. art I, § 8, cl. 11 (enumerating the powers of Congress under the Constitution); see also Johnson, *supra* note 23 at 474–75 (stating that the Constitution, as adopted, gives Congress the power to provide for the common defense and the general welfare of the United States).

<sup>31</sup> See U.S. CONST. art I, § 8, cl. 1–18 (highlighting powers of Congress); see also U.S. CONST. art II (announcing powers that President wields as executive power of the United States).

tripartite system of government is the judiciary, which has no war making authority whatsoever.<sup>32</sup>

The judiciary was arguably intended by the Framers to be the weakest of the three branches.<sup>33</sup> Equipped with neither the power of the “purse” nor the power of the “sword,”<sup>34</sup> the Judiciary has no ability to collect or distribute national monies or wage any military action and was consequently conceived as the most innocuous of the branches.<sup>35</sup>

However, in *Marbury v. Madison*,<sup>36</sup> one of the Supreme Court’s earliest decisions, the Court secured its position as a co-equal branch of government capable of declaring void and unconstitutional actions of the legislative or executive branches.<sup>37</sup> Although the power of judicial review is not expressly articulated in the Constitution and the judiciary is technically incapable of enforcing any of its decisions,<sup>38</sup> as a matter of policy

<sup>32</sup> See U.S. CONST. art III (listing powers granted by the Constitution to the judiciary branch); see also THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) [hereinafter THE FEDERALIST NO. 78 I] (positing that judiciary branch has ability only to render judgments and does not have authority over the “sword”).

<sup>33</sup> See THE FEDERALIST NO. 78 I, *supra* note 32, at 522 (“[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”); see also J. Randy Beck, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENTARY 419, 424 (1999) (book review) (explaining that the Founders did not intend for the judiciary to exercise the more general power of suspending or dispensing with statutes but, rather, intended for it to exercise the lesser power of judicial review).

<sup>34</sup> See THE FEDERALIST NO. 78 I, *supra* note 32, at 522-23 (“The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”); see also U.S. CONST. art III (specifying powers reserved for the judiciary).

<sup>35</sup> See U.S. CONST. art III (creating the judicial branch of federal government); THE FEDERALIST NO. 78, at 476 (Alexander Hamilton) (Garry Wills ed., 1982) [hereinafter THE FEDERALIST NO. 78 II] (noting that the judiciary has no influence over the country’s defense or finances).

<sup>36</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>37</sup> See *id.* at 176-80 (discussing judicial review as allowing the Court to invalidate laws which it finds unconstitutional); see also Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 798 (2004) (commenting that the Supreme Court “early on held that the judiciary is a co-equal branch of government”).

<sup>38</sup> See THE FEDERALIST NO. 78 II, *supra* note 35, at 476 (stating that “[i]t may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”); see also Ronald M. George, Chief Justice of California, *Challenges Facing An Independent Judiciary*, 11th Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice at New York University School of Law (Jan. 26, 2005), in 80 N.Y.U. L. REV. 1345, 1346 (2005) (describing the judicial branch as incapable of enforcing its decisions).



and for the sake of the stability of the nation, the Court's power of judicial review is rarely questioned. When the actions of one branch encroach on the authority of another branch,<sup>39</sup> the Court is called upon to balance the competing interests of the conflicting branches against the danger posed by intruding upon the province of another branch.<sup>40</sup> Although the Court has ruled that the propriety of war is a political question and thus not subject to judicial review,<sup>41</sup> actions and policies of the other branches in the execution of war are subject to judicial scrutiny.<sup>42</sup>

As a result of the judiciary's deliberative nature, it could take several weeks or months for a Constitutional matter to be litigated and decided.<sup>43</sup> However, because of the need for immediate action, courts have traditionally applied a diminished standard of review to cases regarding the wartime policies of Congress and the Executive. Yet, it is still essential that the courts consider whether the policies and actions taken are truly measures of national defense, or are merely unconstitutional

<sup>39</sup> See, e.g., *Clinton v. Jones*, 520 U.S. 681, 702 (1997). Responsibilities do overlap under our system in ways that do not necessarily impair one branch's ability to perform its functions under the Constitution. See *Loving v. United States*, 517 U.S. 748, 757 (1996). Although the branches are not to be completely sealed off from one another, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Id.*

<sup>40</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982) (noting that "a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch"); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (discussing the Court's duty to ensure that an act does not disrupt "the proper balance between the coordinate branches").

<sup>41</sup> See *O'Connor v. United States*, 72 Fed. Appx. 768, 771 (10th Cir. 2003) (concluding that no judicially discoverable standards can be identified that "would permit a court to determine whether the intentions of the president in prosecuting a war are proper"); see also *Orlando v. Laird*, 443 F.2d 1039, 1043-44 (2d Cir. 1971) (noting that there are "no intelligible and objectively manageable standards by which to judge" propriety of military action in Vietnam).

<sup>42</sup> See *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1031 (10th Cir. 2001) (outlining situations in which courts will not hesitate to review military action); see also *Mindes v. Seaman*, 453 F.2d 197, 200 (5th Cir. 1971) (stating that "[i]n numerous cases the courts of appeal have held that review is available where military officials have violated their own regulations").

<sup>43</sup> See Scheindlin, *supra* note 37, at 796 (describing the judiciary as deliberative in nature); see also Daniel A. Farber, *Judicial Supremacy Today: The Importance of Being Final*, 20 CONST. COMMENT. 359, 361-62 (2003) (describing deliberative nature of adjudicatory process).

assertions of power disguised as necessities during wartime to survive judicial review.<sup>44</sup>

For example, early in our nation's history, during the administration of John Adams,<sup>45</sup> the Alien and Sedition Acts of 1798 were adopted, authorizing the executive branch to deport aliens that it judged to be dangerous to peace and good order.<sup>46</sup> Under the act, any immigrant deemed dangerous by the President was deported without any trial, counsel, or even a specific accusation.<sup>47</sup> Likewise, the Sedition Act<sup>48</sup> was passed the same year, prohibiting any criticism of the President and Congress and flying directly in the face of the First Amendment.<sup>49</sup> The Act was passed because of the heated political climate presented by the ongoing war between Great Britain and

<sup>44</sup> See James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 363 (2003) (arguing that "[m]erely because executive conduct occurs overseas and involves issues of war does not mean the courts automatically shed their constitutional role"); see also Scheindlin, *supra* note 37, at 796 (stating "the first question in every case is whether the action taken is truly part of the war effort, or whether 'war' is being invoked to insulate actions that would not otherwise survive judicial review").

<sup>45</sup> See JAMES BISHOP PEABODY, *JOHN ADAMS: A BIOGRAPHY IN HIS OWN WORDS* 6 (Joseph L. Gardner ed., Harper & Row 1973). Although amongst the most important Founders, John Adams received the least public attention and acclaim. Whitehouse.gov, Biography of John Adams, <http://www.whitehouse.gov/history/presidents/ja2.html> (last visited Mar. 20, 2006). He later became the second President of the United States, serving from 1797-1801. *Id.*

<sup>46</sup> See Dunham, *supra* note 20, at 21-22 (describing this Executive power under the Alien and Sedition Acts of 1798); see also James F. Smith, *United States Immigration Policy—A History of Prejudice and Economic Scapegoatism?: A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 229 (1995) (stating the power given to the president by the Acts).

<sup>47</sup> See An Act Concerning Aliens, ch. 585, § 1, 1 Stat. 570, 570-71 (1798) (authorizing the President "at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order."); see also Aaron J. O'Brien, Note, *States' Repeal: A Proposed Constitutional Amendment To Reininvigorate Federalism*, 44 CLEV. ST. L. REV. 547, 567 (1996) (describing this feature of the Alien Act).

<sup>48</sup> Sedition Act, ch. 74, 1 Stat. 596 (1798) (created in addition to the act entitled "An Act for the Punishment of Certain Crimes Against the United States").

<sup>49</sup> See *id.* at § 2, 1 Stat. at 596-97 (stating "[t]hat if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; . . ."); see also Dunham, *supra* note 20, at 21 (describing the Sedition Act as "prohibit[ing] criticism of the president and the Congress – imagine that – just a few years after we passed the First Amendment").

France.<sup>50</sup> Adams, a Federalist, advocated neutrality and sought to avoid what seemed to be a likely war with France, while other Federalists were eager to declare war against the French. The opposing political party, the Republicans, were sympathetic to the French cause.<sup>51</sup> Additionally, many citizens of both England and France were living within the United States at the time and many were eager to criticize the administration.<sup>52</sup> Thomas Jefferson, Adams' successor as President and the leader of the Republican Party, allowed the Acts to expire and pardoned all those convicted under the Acts.<sup>53</sup>

During the 1860s, in the midst of the Civil War, Abraham Lincoln suspended the writ of habeas corpus.<sup>54</sup> Lincoln accomplished this by issuing a presidential proclamation stating that all persons guilty of any disloyal practice shall be subject to court martial.<sup>55</sup> The authority to do this was challenged by Merryman who, without a warrant against him, was taken from his home at two o'clock in the morning and imprisoned at Fort

<sup>50</sup> See Dunham, *supra* note 20, at 21 (explaining that while Adams favored Great Britain, many people including the opposing political party favored France); see also Samuel R. Olken, *Chief Justice John Marshall and The Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 754 (2000) (explaining that John Adams "sought to maintain American neutrality in the wake of international conflict between Great Britain and France").

<sup>51</sup> See Dunham, *supra* note 20, at 21 (reviewing political landscape during Alien and Sedition Acts); see also Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1097 (1985) (describing early American Republican party sympathy toward France).

<sup>52</sup> See Dunham, *supra* note 20, at 21 (noting that many residents within the United States were citizens of either Britain or France and accordingly held allegiances to their home countries); see also Daniel Kanstroom, *From the Reign of Terror to Reigning in the Terrorists: The Still-Undefined Rights of Non-Citizens in the "Nation of Immigrants"*, 9 NEW ENG. J. INT'L & COMP. L. 47, 71-74 (2003) (remarking upon alleged threatening criticism of 1790's American government by non-citizens regarding international conflicts in as foundation for Alien and Sedition Act legislation).

<sup>53</sup> See Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L. Q. 683, 694 (1998) (commenting on Jeffersonian policies including his pardoning of those convicted under 1798's alien and sedition acts); see also Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 541 (2005) (recognizing pardons given by Thomas Jefferson following expiration of Alien and Sedition Acts).

<sup>54</sup> See Dunham, *supra* note 20, at 22 (highlighting President Abraham Lincoln's suspension of habeas corpus); see also Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience - A History Lesson For a Post- 9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 33 (2003) (acknowledging Lincoln's suspension of habeas corpus during the American Civil War).

<sup>55</sup> See Dunham, *supra* note 20, at 22 (analyzing suspension of habeas corpus by Lincoln); see also Eric Muller, *All the Themes But One*, 66 U. CHI. L. REV. 1395, 1399 (1999) (writing about Lincoln's methodology for enforcing suspension of habeas corpus).

McHenry.<sup>56</sup> The government claimed his detention was based on treason and rebellion, without proof or even specific allegations of what constituted these crimes.<sup>57</sup> Lincoln's action was struck down in federal court as overreaching, and the court noted that according to the Constitution, only Congress has the authority to suspend habeas corpus.<sup>58</sup> Notwithstanding the court's ruling and subsequent issuance of the writ, Lincoln detained Merryman in military custody until he was later indicted for conspiracy to commit treason.<sup>59</sup>

Also during the Civil War, the constitutionality of trying civilians in military tribunals was challenged.<sup>60</sup> Milligan, a civilian, was accused by the federal military in Indiana of being disloyal to the federal war effort and was sentenced to be hanged.<sup>61</sup> Milligan filed a petition for writ of habeas corpus with the Supreme Court.<sup>62</sup> In a surprising stance against the Executive, the Supreme Court ruled that Milligan was not within the jurisdiction of the military courts and was entitled to process in Article III courts when they were open and operating.<sup>63</sup>

During World War I, Congress passed the Espionage Act of

<sup>56</sup> *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (working through facts regarding Merryman's case); see also Finkelman, *supra* note 54, at 35–36 (reciting facts regarding circumstances of Merryman's arrest and its impact).

<sup>57</sup> See *Merryman*, 17 F. Cas. at 147 (assessing government's claims regarding Merryman's detention); see also Finkelman, *supra* note 54, at 36 (reviewing government's charges against Merryman).

<sup>58</sup> U.S. CONST. art I, § 9 (explicating Congress' constitutional role in suspending habeas corpus); see also *Merryman*, 17 F. Cas. at 149 (discussing impropriety of Presidents performing this suspension without congressional authority).

<sup>59</sup> See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 38–39 (First Vintage Books 2000) (1998) (certifying facts regarding Merryman's detainment in defiance of court order, and later reviewing Merryman's charges); see also Finkelman, *supra* note 54, at 39 (noting that President Lincoln largely ignored Supreme Court's ruling in *Merryman*).

<sup>60</sup> See *Ex parte Milligan*, 71 U.S. 2, 121–22 (1866) (discussing use of military law for civilians); Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 96–97 (using *Milligan* as evidence for past use of martial law on civilians).

<sup>61</sup> See *Milligan*, 71 U.S. at 107 (explaining factual bases for Milligan's appeal); see also Finkelman, *supra* note 54, at 41–42 (discussing relevant facts regarding Milligan's detainment and charges).

<sup>62</sup> See *Milligan*, 71 U.S. at 107 (following procedural route of Milligan's case to the Supreme Court); see also Finkelman, *supra* note 54, at 36 (running through procedural dispositions of Milligan's case).

<sup>63</sup> See *Milligan*, 71 U.S. at 127 (understanding that courts may be closed due to insurrection and thus martial law may sometimes be appropriate); REHNQUIST, *supra* note 59, at 137 (noting court decision's limited application mandating civilian law only when courts are open).

1917,<sup>64</sup> prosecuting dissenters to the war and the draft. On three separate occasions the Supreme Court affirmed convictions under that Act.<sup>65</sup> Additionally, Congress passed the Sedition Act of 1918, making it unlawful to publish any disloyal language intended to cause contempt or scorn for our form of government.<sup>66</sup> Similarly, during the Red Scare of 1919 to 1920, thousands of citizens were summarily deported without due process.<sup>67</sup>

After the Japanese attack on Pearl Harbor and America's entry into World War II, the national security rationale prompted the Court to uphold the constitutionality of the internment of individuals of a certain ethnic origin in the now notorious Supreme Court decision of *Korematsu v. United States*<sup>68</sup>. As a result many thousands of people were interned because of their Japanese ancestry, including U.S. citizens.<sup>69</sup> In 1983, President Ronald Reagan said *Korematsu* did a grave injustice, and gave the National Medal of Freedom to Fred Korematsu.<sup>70</sup> Additionally, Congress voted to spend millions of dollars in reparations to those who were interned.<sup>71</sup>

<sup>64</sup> See Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917), amended by ch. 75, § 1, 40 Stat. 553 (1918) (codifying criminal laws regarding draft dodgers and dissenters during wartime); see also Dunham, *supra* note 20, at 22 (noting use of espionage act in 1917 to prosecute war dissenters).

<sup>65</sup> See, e.g., *Abrams v. U.S.*, 250 U.S. 616, 616–17 (1919) (upholding conviction under Espionage Act for publishing anti-war material); *Debs v. U.S.*, 249 U.S. 211, 211–12 (1919) (affirming conviction under Espionage Act for advocating pro-socialist measures); *Schenck v. U.S.*, 249 U.S. 47, 47–48 (1919) (upholding conviction under Espionage Act for distribution of leaflets containing anti-war material).

<sup>66</sup> See Sedition Act of 1918, ch. 75, 40 Stat. 553, 553–54 (1918), repealed by ch. 136, 41 Stat. 1359 (1921) ("An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes"); see also John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1097 (2002) (surveying 1918's Sedition Act and its usage).

<sup>67</sup> See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 995 (2002) (reviewing origins of 1919 red scare); see also Dunham, *supra* note 20, at 23 (discussing mass deportation due to Red Scare).

<sup>68</sup> See *Korematsu v. U.S.*, 323 U.S. 214, 214–17 (1944) (upholding constitutionality of Japanese internment camps used during World War II); see also Dunham, *supra* note 20, at 23 (reiterating history regarding *Korematsu* and its effect).

<sup>69</sup> See William Fisher, *Rights: WWII Register Against Internment of Japanese Dies at 86*, IPS-INTER PRESS SERVICE, April 1, 2005 (providing examples of who was interned).

<sup>70</sup> See Orville Schell, *Rounding Up Americans*, N.Y. TIMES, Jan. 1, 1984, at § 7, p. 22 (exploring the injustice).

<sup>71</sup> See Laura K. McFadden, *'Justice Has Finally Prevailed'; Japanese-Americans await cash reparations from the U.S. for internment during WWII*, NEWSDAY, Dec. 24,

Thus, history has shown that during times of emergency the actions of the government can pose the most substantial threats to the civil liberties of not only alien criminal defendants or those captured during war time, but also of American citizens and civilians.<sup>72</sup> Moreover, in times of crisis, blind deference to the Executive has led the Supreme Court to hand down decisions that tarnish U.S. history.<sup>73</sup> This Note suggests that the Executive will always have a compelling interest in national security, an interest that is naturally heightened during time of war.<sup>74</sup> However, it is asserted that fear of a military assault should not jeopardize the constitutional rights of accused individuals,<sup>75</sup> regardless of their citizenship or the egregiousness of the crime charged against them.<sup>76</sup>

### I. RECENT CASES: "ENEMY COMBATANTS"

The latest threat to civil liberties arises with regard to prisoners taken into captivity in the recent military occupation of Afghanistan and other regions in the Middle East classified as 'enemy combatants.'

1989, at 17 (noting that many Japanese-Americans were celebrating this long awaited day).

<sup>72</sup> See Scheindlin, *supra* note 37, at 801 (stating that judges need to be vigilant in times of crisis to protect constitutional guarantees); see also Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 3 (2005) (postulating how detrimental effects arise from war-time decisions).

<sup>73</sup> See Dunham, *supra* note 20, at 21 (admitting "[o]ur country in times of crisis has a history of actions we later decry and discredit"); see also Jennifer M. Hannigan, Comment, *Playing Patriot Games: National Security Challenges Civil Liberties*, 41 HOUS. L. REV. 1371, 1375 (2004) (detailing how our government finds itself remorseful and embarrassed after realizing a deprivation of civil liberties was unnecessary).

<sup>74</sup> See Scheindlin, *supra* note 37, at 796 (asking whether "the courts should abdicate their traditional role – or [whether] the rule of law is suspended – when the nation is at war?"); see also Rana Jazayerli, *War and the First Amendment: A Call for Legislation to Protect A Press' Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT'L L. 131, 132 (1997) (discussing government suppression of the First Amendment during wartime).

<sup>75</sup> See *Duncan v. Kahanamoku*, 327 U.S. 304, 324–25 (1946) (Murphy, J. concurring) (stating that "the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action"); see also Whitehead & Aden, *supra* note 66, at 1124 (discussing constitutional safeguards owed to accused persons even during times of war).

<sup>76</sup> See Kelly, *supra* note 4, at 788 (stating that constitutional protections and fundamental notions of due process are applicable to all defendants within jurisdiction of American courts); see also David Cole, *Rounding up Unusual Suspects: Human Rights in the Wake of 9/11: Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 367 (2003) (arguing that foreign nationals are entitled to rights of American citizens).

*A. John Walker Lindh*

Slightly over a month after the September 11 attacks a handful of captured Taliban soldiers led a revolt in a prison near Mazar-e Sharif, a town in northwest Afghanistan.<sup>77</sup> Although the uprising was ultimately quashed by Northern Alliance troops, hundreds of prisoners along with U.S. C.I.A. agent Michael Spann were killed. Those Taliban prisoners who survived fled to the basement of the prison during the revolt and were eventually flushed out when Northern Alliance forces diverted an irrigation stream into the basement.<sup>78</sup> One of those surviving prisoners who emerged from the basement was John Walker Lindh, a twenty year old American man raised in northern California. Lindh was immediately taken into U.S. custody and questioned by the FBI and CIA.<sup>79</sup> The most serious of the numerous criminal charges against Lindh was conspiracy to kill U.S. nationals, due to the death of Agent Spann.<sup>80</sup> Lindh's defense attorney argued that upon being taken into custody, Lindh requested legal representation, and was denied access to an attorney for 54 days while he was held incommunicado.<sup>81</sup> During this time government officials leaked evidence to the media regarding Lindh's case,<sup>82</sup> prejudicing the public regarding his guilt or innocence. Attorney General John Ashcroft denied these allegations and asserted that Lindh waived his right to defense counsel both orally and in writing when he was being interrogated.<sup>83</sup> Ultimately, Lindh pleaded guilty to one count of supplying services to the Taliban and to a criminal information charge that he carried arms while fighting against the Northern Alliance in exchange for a twenty year sentence and the dismissal of all other charges.<sup>84</sup> Due to this plea the

<sup>77</sup> See CNN.com, John Walker Lindh, Profile, The Case of the Taliban American, <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html> (last visited Mar. 20, 2006).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See CNN.com, John Walker Lindh makes first court appearance, <http://archives.cnn.com/2002/LAW/01/24/walker.court/> (last visited Mar. 20, 2006).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *U.S. v. Lindh*, 227 F. Supp. 2d 565, 570 (2002) (holding Lindh guilty of violating U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2006)).

constitutionality of his treatment upon his capture was not contested.

*B. Yaser Esam Hamdi*

Yaser Hamdi, born in Louisiana, is an American citizen who moved to Saudi Arabia as a young child.<sup>85</sup> Hamdi first came into military custody after the surrender of the Taliban late in 2001.<sup>86</sup> Once captured, Hamdi was determined to be an enemy combatant;<sup>87</sup> he was transferred to several prisons in Afghanistan, passed through Camp X-Ray in Guantanamo Bay, and, ultimately, placed in a naval brig in South Carolina. The government's authority to take custody of Hamdi was Pub. L. No. 107-40 (Authorization for Military Force).<sup>88</sup> No charges were brought against him. Once in Norfolk, the district's public defender Frank Dunham requested to see Hamdi, who was being tried in the same district as John Walker Lindh. Anticipating a criminal case against Hamdi and aware that the strongest evidence used in the case against Lindh was Lindh's own statements made while in custody,<sup>89</sup> Dunham wanted to provide Hamdi with the appropriate advice. However, it was not until several weeks into the case that Dunham was informed that his inclination was wrong and that, in fact, no criminal charges were pending against Hamdi.<sup>90</sup> The government's sole justification for

<sup>85</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

<sup>86</sup> *Id.* at 510.

<sup>87</sup> *Id.* at 512–13.

<sup>88</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (authorizing President's use of United States Armed Forces to "use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States"); see also Hamdi, 542 U.S. at 510 (stating that purpose of Authorization for Use of Military Force was "to subdue al Qaeda and quell the Taliban regime that was known to support it").

<sup>89</sup> See Dunham, *supra* note 20, at 33 (explaining particular concerns about "providing Hamdi with appropriate advice, particularly, you know, little things like the right to remain silent which sometimes the military says doesn't apply to a military interrogation for intelligence purposes"); see also Katharine Q. Seelye, *Threats and Responses: The Detainee; Court to Hear Arguments in Groundbreaking Case of U.S. Citizen Seized With Taliban*, N.Y. TIMES, Oct. 28, 2002, at A13 ("Mr. Dunham immediately sought to interview his client to determine if he was indigent and needed a lawyer, but the Pentagon never responded.").

<sup>90</sup> See Dunham, *supra* note 20, at 33 (stating that four weeks after Dunham's presence on the case, he was informed that Hamdi was being held as an enemy combatant and was not to be prosecuted criminally); see also Katherine Q. Seelye, *A Nation Challenged: Prisoners; Believed to be U.S. Citizen, Detainee is Jailed in Virginia*, N.Y. TIMES, Apr. 6, 2002, at A7 (stating that as of April 6, 2002, nearly a month after Hamdi's



detaining Hamdi was because he was being held as an enemy combatant.<sup>91</sup>

Seeking justification for the incarceration of a United States citizen, Hamdi and Dunham, who sought "next friend" status and demanded unmonitored conversations with his client, a halt to interrogations, and his release, filed petitions of habeas corpus with the federal district court for the Eastern District of Virginia.<sup>92</sup> The court combined the petitions and granted Dunham immediate unmonitored contact with Hamdi.<sup>93</sup> The United States appealed this decision to the Fourth Circuit, which remanded with instructions to dismiss; it held that Dunham and Hamdi lacked standing to file the habeas petitions due to Dunham's lack of a private relationship with Hamdi.<sup>94</sup>

While this decision was pending in the Fourth Circuit, Hamdi's father filed a habeas petition in district court seeking next friend status, the appointment of counsel to Hamdi, the cessation of government interrogations, and Hamdi's release.<sup>95</sup> The district court allowed Hamdi's father to proceed as next friend, appointed counsel, and ordered that Hamdi be allowed unmonitored contact with counsel.<sup>96</sup> After the government's appeal, the Fourth Circuit again reversed and ruled that the district court must first thoroughly brief Hamdi's case before Hamdi was granted access to counsel.<sup>97</sup> On remand to the district court, the government was, for the first time in about eight months after Hamdi's detention, ordered to produce evidence to justify its contention

February 11, 2002 transfer to Guantanamo, officials did not charge Hamdi with a crime and "it [was] not clear . . . what charges [Hamdi] might face").

<sup>91</sup> See Dunham, *supra* note 20, at 33 (stating that government officials did not plan on prosecuting Hamdi, but instead were classifying him as an enemy combatant); see also Seelye, *supra* note 89, at A13 (stating that the Bush administration considered Hamdi to be an "enemy combatant" and could therefore be held until "hostilities cease").

<sup>92</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004) (plurality opinion).

<sup>93</sup> *Id.* at 507.

<sup>94</sup> *Id.* at 507.

<sup>95</sup> See Hamdi v. Rumsfeld, 296 F.3d 278, 279 (4th Cir. 2002) (stating that Esam Foud Hamdi filed a "next friend" application on behalf of his son Yaser Esam Hamdi); see also James Park Taylor, *Singularity: We Have Met the Enemy and He is Us: A Legal Guide to U.S. Citizens as 'Enemy Combatants'*, 29 MONTANA LAWYER 8, 9 (2004) (describing chronology of Esam Foud Hamdi's "next friend" application).

<sup>96</sup> See Hamdi, 296 F.3d at 279 (describing lower court decision granting Esam Foud Hamdi's "next friend" application). See generally Dunham, *supra* note 20 (telling story of Yasir Hamdi's legal battle from perspective of court appointed public defender).

<sup>97</sup> Hamdi, 296 F.3d at 282-83 (remanding for further proceedings); see also Philip Shenon, *Appeals Court Keeps an American Detainee and His Lawyer Apart*, N.Y. TIMES, July, 13, 2002, at A8 (explaining Fourth Circuit decision).

that Hamdi was allied with the Taliban.<sup>98</sup> The sole evidence was a statement made by a special advisor to the Under Secretary of Defense for Policy,<sup>99</sup> known as the "Mobbs Declaration"<sup>100</sup> which

<sup>98</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 512 (2004) (plurality opinion) (describing government's response to motion to dismiss in district court); *see also* Frank W. Dunham Jr., *Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 167 (2005) (stating that the district court was directed to "exhaust all other avenues before taking the drastic step of allowing petitioner to see his counsel").

<sup>99</sup> *Hamdi*, 542 U.S. at 512 ("[The Mobbs Declaration] remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention."); *see also* Dunham, *supra* note 98, at 168 ("The government argued that the declaration, which was based on Mobbs' review of the file . . . was factually dispositive as to whether Hamdi had been properly classified as an enemy combatant.").

<sup>100</sup> The full text of the Mobbs Declaration reads:

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a Special Advisor to the Under Secretary of Defense for Policy. In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban). I have been involved with detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

2. I am familiar with Department of Defense, U.S. Central Command and U.S. land forces commander policies and procedures applicable to the detention, control and transfer of al Qaeda or Taliban personnel in Afghanistan during the relevant period. Based upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of Yaser Esam Hamdi and his detention by U.S. military forces.

3. Yaser Esam Hamdi traveled to Afghanistan in approximately July or August of 2001. He affiliated with a Taliban military unit and received weapons training. Hamdi remained with his Taliban unit following the attacks of September 11 and after the United States began military operations against the al Qaeda and Taliban on October 7, 2001.

4. In late 2001, Northern Alliance forces were engaged in battle with the Taliban. During this time, Hamdi's Taliban unit surrendered to Northern Alliance forces and he was transported with his unit from Konduz, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of the Northern Alliance forces. Hamdi was directed to surrender his Kalashnikov assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so. After a prison uprising, the Northern Alliance transferred Hamdi to a prison at Sheberghan, Afghanistan, which was also under the control of Northern Alliance forces.

5. While in the Northern Alliance prison at Sheberghan, Hamdi was interviewed by a U.S. interrogation team. He identified himself as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. Hamdi spoke English.

6. Al Qaeda and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners.

the government contended was sufficient evidence to detain Hamdi without a single hearing.<sup>101</sup>

Judge Doumar of the district court for the Eastern District of Virginia was not persuaded by this sparse evidence.<sup>102</sup> Judge Doumar identified the judiciary's role in securing the constitutional rights of the accused, even in the face of the government's claim of national defense.<sup>103</sup> Invoking the language of a prior Supreme Court case,<sup>104</sup> Judge Doumar stated:

The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be

Accordingly, individuals associated with al Qaeda or Taliban were and continue to be enemy combatants. Based upon his interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant.

7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control. Based on an order of the U.S. land forces commander, a group of detainees, including Hamdi, was transferred from the Northern Alliance-controlled Sheberghan prison to the U.S. short-term detention facility in Kandahar. Hamdi was in-processed and screened by U.S. forces at the Kandahar facility.

8. In January 2002, a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay.

9. A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant . . .

Taylor, *supra* note 95, at 9 n.12.

<sup>101</sup> See Dunham, *supra* note 98, at 168 (explaining that the government felt Mobbs' Declaration was "factually dispositive"); see also Taylor, *supra* note 95, at 9 (stating that the government felt the Mobbs Declaration "standing alone" was adequate justification for Hamdi's detention).

<sup>102</sup> See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002) (refusing to give deference to Mobbs Declaration without judicial review); see also Taylor, *supra* note 95, at 9 (describing Judge Doumar's lack of support for the Mobbs Declaration).

<sup>103</sup> See *Hamdi*, 243 F. Supp. 2d at 532 (explaining American citizen's constitutional entitlement to meaningful judicial review when his individual liberties are being infringed upon), *rev'd*, 316 F.3d 450, 476 (4th Cir. 2003) (finding Hamdi not entitled to dispute Mobbs Declaration), *vacated and remanded*, 542 U.S. 507, 538-39 (2004) (plurality opinion) (announcing while documents such as Mobbs Declaration may be used as evidence against alleged enemy combatant, those accused must be given opportunities to rebut such evidence); see also Nat Hentoff, *The Constitution Trumps the President*, TULSA WORLD, June 13, 2004, at A15 (describing Judge Doumar's anger after reading government's two-page justification for denying Hamdi his Constitutional rights).

<sup>104</sup> *Hamdi*, 243 F. Supp. 2d at 532 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)).

deemed an end in itself, justifying any exercise of (executive) power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart [sic] . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties [sic] . . . which makes the defense of the Nation worthwhile."<sup>105</sup>

The judge also noted that, notwithstanding the elusive designation of Hamdi as an enemy combatant, the government failed to explain why Hamdi should be treated any differently than other captured members of the Taliban. More specifically, Judge Doumar emphasized that since there were no criminal charges against Hamdi, no reason, other than the classification, provided to justify either Hamdi's solitary confinement without communication for four months, or his eight to ten month incarceration.<sup>106</sup>

In fact, Judge Doumar identified deficiencies within each paragraph of the Mobbs Declaration, which the government submitted to prove Hamdi's enemy combatant status, and justify his indefinite incarceration.<sup>107</sup> The district court held that the declaration was insufficient to detain Hamdi without due process, and again ordered the government to produce the criteria it used to determine Hamdi's enemy combatant status.<sup>108</sup> Once again the government appealed the district court's judgment to the Fourth Circuit.<sup>109</sup>

<sup>105</sup> *Hamdi*, 243 F. Supp. 2d at 532 (citing *Robel*, 389 U.S. at 264).

<sup>106</sup> See Taylor, *supra* note 95, at 9 (reiterating Judge Doumar's review of Mobbs Declaration); see also *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (declaring prompt need for determination before neutral judges where there were warrantless arrests).

<sup>107</sup> See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 533–35 (E.D. Va. 2002), *rev'd*, 316 F.3d 450, 476 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 507, 538–39 (2004) (plurality opinion) (enumerating various deficiencies in Government's argument); see also Taylor, *supra* note 95, at 9 (delineating Judge Doumar's explanation of various paragraphs in Mobbs Declaration).

<sup>108</sup> See *Hamdi*, 243 F. Supp. 2d at 535–36 (explaining evidence submitted failed to prove Hamdi's enemy combatant status); see also Eric K. Yamamoto, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on their Sixtieth Anniversary: White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROB. 285, 321–22 (2005) (summarizing Judge Doumar's skepticism of Hamdi's classification as enemy combatant in light of government's failure to produce criteria leading to such conclusion).

<sup>109</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003) (providing procedural context), *vacated and remanded*, 542 U.S. 507, 538–39 (2004) (plurality opinion); see also

On appeal, the Fourth Circuit, cited Article I, Section 8<sup>110</sup> and Article II, Section 2<sup>111</sup> of the U.S. Constitution to substantiate its great deference to Congress' and the President's war-making authorities. Consequently, the Fourth Circuit held that the Mobbs Declaration was itself sufficient to justify Hamdi's indefinite detention without access to counsel or appearance in court.<sup>112</sup> The court stated:

[O]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.<sup>113</sup>

With that, the Fourth Circuit, relying on *Ex parte Quirin*'s<sup>114</sup> precedent, justified the indefinite detention of a United States citizen who was being held without criminal charges pending against him, and was being denied communication with counsel.<sup>115</sup>

Hamdi petitioned for a rehearing en banc after the Fourth Circuit's opinion was handed down, but this petition was denied eight to four.<sup>116</sup> One of the Fourth Circuit's dissenting judges,

Laura Sullivan, *U.S. Detention Tests Scope of Antiterror Law; Justices Take up Cases of 2 Citizens Held 2 Years; No Charges; Legal aid Delayed; Unbridled Authority vs. Rights of Americans*, THE BALTIMORE SUN, Apr. 29, 2004, at A1 (stating that Fourth Circuit sided with government on appeal).

<sup>110</sup> U.S. CONST. art I, § 8, cl. 11.

<sup>111</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>112</sup> See *Hamdi*, 316 F.3d at 476 ("[D]espite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration."); see also Gregory Dolin, *The Great Writ of Incoherence: An Analysis of the Supreme Court's Rulings on "Enemy Combatants"*, 36 GEO. J. INT'L L. 623, 627 (2005) (providing Fourth Circuit's rationale for reversing district court ruling).

<sup>113</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003).

<sup>114</sup> 317 U.S. 1 (1942).

<sup>115</sup> See Yamamoto, *supra* note 108, at 288 (considering post-9/11 indefinite detentions without charges or right to attorney assistance of alleged enemy combatants); see also Taylor *supra* note 95, at 9 (explaining court's reliance on *Ex parte Quirin* to hold Hamdi indefinitely).

<sup>116</sup> See *Hamdi v. Rumsfeld*, 337 F.3d 335, 341 (4th Cir. 2003) (deciding not to rehear Hamdi's case); see also Bruce Zagaris, *U.S. Supreme Court Takes Certiorari Over US*

Judge Motz, pointed out some of the fundamental errors in the Fourth Circuit's majority opinion.<sup>117</sup> Motz noted that the government had not offered any facts to support its classification of Hamdi as an enemy combatant, and had denied Hamdi consultation with counsel or an opportunity to challenge the allegations of the Mobbs declaration. Thus, Judge Motz stated Hamdi was being denied the most basic procedural protections offered by the Constitution.<sup>118</sup> Furthermore, the Fourth Circuit decision stands squarely in the face of Supreme Court precedent that guarantees even aliens, which Hamdi is not, this constitutional right.<sup>119</sup> Thus Judge Motz notes,

"Without any acknowledgment of its break with precedent, the panel embarks on a perilous new course—approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as 'incomplete' and 'inconsistent' hearsay."<sup>120</sup>

When *Hamdi* reached the Supreme Court in June 2004, the Court ultimately vacated the Fourth Circuit's judgment and remanded the case, noting that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>121</sup> In a plurality opinion, the Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to

*Citizen Arrested in Afghanistan*, INT'L ENFORCEMENT L. REP., Mar. 1, 2004, at 96 (stating court voted not to rehear Hamdi's case eight to four).

<sup>117</sup> See *Hamdi*, 337 F.3d at 369 (Motz, J., dissenting) (expressing her belief that panel "seriously erred"); see also Benjamin Wittes, *Enemy Americans*, ATLANTIC MONTHLY, July-Aug 2004, at 127 (insisting on implementing some mechanism to determine Hamdi's status).

<sup>118</sup> See *Hamdi*, 337 F.3d at 370–71 (Motz, J., dissenting) ("Denied the most basic procedural protections, Hamdi could not possibly mount a challenge to the Executive's designation of him as an enemy combatant."); see also *High Court Should Hear Yaser Esam Hamdi's Case*, VIRGINIAN-PILOT, Oct. 6, 2003, at B12 (reiterating Judge Motz's concern that allegations against Hamdi were not tested).

<sup>119</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950) (proclaiming courts entertain alien's pleas to determine whether they are enemies); see also *Ludecke v. Watson*, 335 U.S. 160, 172 n. 17 (1948) (explaining that "whether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts").

<sup>120</sup> *Hamdi*, 337 F.3d at 371 (Motz, J., dissenting); see also *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003) (describing executive power under the War Powers Act relating to detention alleged enemy combatants).

<sup>121</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (holding that the Constitution envisions roles for all three branches of government during war times).

contest the factual basis for that detention before a neutral decisionmaker.”<sup>122</sup> The Court recognized that the “threshold question before [it] [was] whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants’”<sup>123</sup> but declined to adjudicate this issue. Instead the Court issued a narrow holding, specifically applicable to circumstances where the enemy combatant is a United States citizen who is “part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”<sup>124</sup> The Court held that Congress authorized the detention of enemy combatants in these specific circumstances, but Hamdi, an American citizen, was constitutionally entitled to contest the factual basis of his detention before a neutral decision-maker.<sup>125</sup> Justice Souter, joined by Justice Ginsberg, concurred in the judgment, agreeing that the government must produce justification for Hamdi’s enemy combatant status, but disagreed with the plurality that Hamdi’s detention was authorized. Justice Scalia, joined by Justice Stevens, dissented, arguing that Hamdi was entitled to habeas relief and that the Authorization for Use of Military Force (AUMF) falls far short of the requisite constitutional authority necessary for Hamdi’s indefinite detention.<sup>126</sup> In a separate dissent Justice Thomas argued that the President’s designation of Hamdi as an enemy combatant is constitutional under the Executive’s war-making powers and asserted that “the plurality utterly fails to account for the Government’s compelling interests and for [the Court’s] institutional inability to weigh competing concerns correctly.”<sup>127</sup> The plurality in *Hamdi*, therefore, left unresolved the question of whether the executive can constitutionally deprive a military

<sup>122</sup> *Id.* at 509.

<sup>123</sup> *Id.* at 516.

<sup>124</sup> *Id.* at 516 (quoting Brief for Respondents 3).

<sup>125</sup> *Id.* at 533 (emphasizing the importance of a timely hearing, upon request, on one’s status as an enemy combatant).

<sup>126</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (plurality opinion) (stating that indefinite detention would be permissible if the Suspension Clause of the Constitution was in effect, but no party contends the implication of such clause under the AUMF).

<sup>127</sup> *Id.* at 579 (Thomas, J., dissenting) (stating Hamdi’s habeas petition should be denied as the judiciary lacks the knowledge to question the Executive’s exercise of congressionally authorized power).

detainee of due process solely through its designation of 'enemy combatant' status. On remand, the case was dismissed in October, 2004.<sup>128</sup>

### C. Jose Padilla

Jose Padilla, like Yasir Hamdi, is an American citizen.<sup>129</sup> Padilla was arrested at O'Hare airport on a federal material witness warrant for grand jury proceedings in the Southern District of New York.<sup>130</sup> The government contended that Padilla had traveled to Egypt, Saudi Arabia, and Afghanistan, and, while in Afghanistan, met with al Qaeda operatives and suggested to them that he steal radioactive materials in the United States for the purposes of building and detonating a radiological dispersal device, or "dirty bomb."<sup>131</sup> The government further alleged that Padilla received training from al Qaeda and returned to the United States in order to conduct reconnaissance or other attacks on its behalf.<sup>132</sup>

Padilla was transferred from detention in Chicago to New York, where defense counsel was appointed to defend him on his arrest on the material witness warrant.<sup>133</sup> Before a decision was returned on the motion to dismiss the warrant, the government

<sup>128</sup> See Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American it had Captured in Afghanistan*, N.Y. TIMES, Oct. 11, 2004, at A5 (explaining that Hamdi's renunciation of US citizenship was condition of release); see also Jerry Markon, *Hamdi Returned to Saudi Arabia; U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A02 (noting that his release means the government never has to give justification for his detention).

<sup>129</sup> See *Padilla v. Bush*, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002) (describing Padilla as a US citizen arrested in the United States), *rev'd* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see also Taylor, *supra* note 95, at 12 (detailing past offenses including convictions of murder as a juvenile and on a weapons charge as an adult).

<sup>130</sup> Pursuant to 18 U.S.C. § 3144 (1986) federal courts can issue warrants for the purpose of securing the appearance of material witnesses at grand jury proceedings. See *Padilla*, 233 F. Supp. 2d at 571. To obtain this warrant, the government showed that Padilla had information pertinent to grand jury investigations of the September 11, 2001 terrorist attacks. See Taylor, *supra* note 95, at 12.

<sup>131</sup> See *Padilla*, 233 F. Supp. 2d at 572-73 (describing allegations made in the Mobbs Declaration against Padilla); see also Taylor, *supra* note 95, at 12 (detailing facts surrounding Padilla's detention).

<sup>132</sup> See *Padilla*, 233 F. Supp. 2d at 573 (alleging that Padilla was not a member of Al Qaeda, but acted under the direction of Al Qaeda officials); see also Taylor, *supra* note 95, at 12 n.34 (stating Padilla alleged he was in the US visiting his son).

<sup>133</sup> See *Padilla*, 233 F. Supp. 2d at 571 (stating the government detained him in their ongoing investigations into the September 11th terrorist attacks); see also Taylor, *supra* note 95, at 12 (observing defense counsel's assertion that the government lacked probable cause for Padilla's detention).



notified the court that it was going to vacate the warrant anyway.<sup>134</sup> The reason for this was because the President had designated Padilla an enemy combatant and had transferred him to a naval brig in South Carolina.<sup>135</sup> In response, Padilla filed a petition for habeas corpus, and the government responded the same way it had in *Hamdi*, challenging defense counsel's status to act as next friend and also the court's jurisdiction over the named respondents.<sup>136</sup> The government also asserted that the habeas case should be moved to the jurisdiction of Padilla's naval brig, the Fourth Circuit, where it would conveniently fall

<sup>134</sup> See *Padilla v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002) (stating that the government had withdrawn the subpoena), *rev'd* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>135</sup> The Presidential order giving Padilla enemy combatant status read as follows:

To the Secretary of Defense: Based on the information available to me from all sources, . . . In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40); I, George W. Bush, as President of the United States and Commander in Chief of the U.S. armed forces, hereby determine for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

See Taylor, *supra* note 95, at 12 n.37.

<sup>136</sup> See Taylor, *supra* note 95, at 12 (explaining that since Padilla had no outside contact with friends or family, Padilla's attorney filed the habeas petition on Padilla's behalf).

squarely within *Hamdi* precedent.<sup>137</sup> Once again, Michael Mobbs, on behalf of the government, submitted two declarations (one sealed, one unsealed)<sup>138</sup> that Padilla's attorneys were denied access to, and both based entirely on hearsay.<sup>139</sup> The Southern District held that the Secretary of Defense was a properly named defendant and that he fell within the jurisdiction of the Southern District.<sup>140</sup> On the merits, the court held that the President had the authority to hold Padilla in custody because of his enemy combatant status.<sup>141</sup>

<sup>137</sup> See *Padilla*, 233 F. Supp. 2d at 571 (explaining Department of Defense decision to move Padilla to South Carolina); see also Taylor, *supra* note 95, at 12 (noting Padilla's case was heard in the District Court for the Southern District of New York).

<sup>138</sup> See Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (02 Civ. 4445(MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf> (setting forth factual basis for Padilla's designation as "enemy combatant"); see also Chris K. Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 135 n.152 (2004) (discussing Mobbs Declaration).

<sup>139</sup> A summary of the Mobbs Declaration by Judge Mukasey appears as follows:

The Mobbs Declaration states that Padilla was born in New York and convicted in Chicago, before he turned 18, of murder. Released from prison after he turned 18, Padilla was convicted in Florida in 1991 of a weapons charge. After his release from prison on that charge, Padilla moved to Egypt, took the name Abdullah al Muhajir, and is alleged to have traveled also to Saudi Arabia and Afghanistan. In 2001, while in Afghanistan, Padilla is alleged to have approached senior Usama Bin Laden lieutenant Abu Zubaydeh and proposed, among other things, stealing radioactive material within the United States so as to build, and detonate a "radiological dispersal device (also known as a 'dirty bomb') within the United States. Padilla is alleged to have done research on such a project at an al Qaeda safehouse in Lahore, Pakistan, and to have discussed that and other proposals for terrorist acts within the United States with al Qaeda officials he met in Karachi, Pakistan, on a trip he made at the behest of Abu Zubaydah. One of the unnamed confidential sources referred to in the Mobbs Declaration said he did not believe Padilla was actually a member of al Qaeda, but Mobbs emphasizes that Padilla had extended contacts with senior Al Qaeda members and operatives and that he acted under the direction of [Abu] Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or conduct other attacks on their behalf. As mentioned above, Padilla was taken into custody on the material witness warrant on May 8, in Chicago, where he landed after traveling, with one or more stops, from Pakistan.

Taylor, *supra* note 95, at 13 (internal quotations and citations omitted).

<sup>140</sup> See *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564, 582, 587 (S.D.N.Y. 2002) (finding Secretary of Defense Rumsfeld a proper respondent over whom personal jurisdiction existed); see also Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending New York v. Quarles and the Departure from Enemy Combatant Designations*, 53 DEPAUL L. REV. 831, 857 (2003) (recounting procedural holdings).

<sup>141</sup> See *Padilla*, 233 F.Supp.2d at 599 (finding Padilla's detention not violative of statute nor otherwise prohibited as a matter of law); Iijima, *supra* note 138, at 136 (noting the district court's holding).

On appeal, the Second Circuit upheld the Southern District's holding that Secretary Rumsfeld was properly served and that the court had jurisdiction over him.<sup>142</sup> Arguing on the merits, the government asserted that the whole of the United States was a battlefield.<sup>143</sup> This was an intentional use of phraseology on the part of the government, not necessary to invoke the gravity of the situation, as the Second Circuit is seated in proximity to the World Trade Center, but consistent with the Fourth Circuit's rationale in *Hamdi v. Rumsfeld*.<sup>144</sup> Under the rationale of *Hamdi*,<sup>145</sup> to detain a citizen the government need only show that he was captured in a "zone of active combat."<sup>146</sup> In the case of Hamdi, who was captured in Afghanistan,<sup>147</sup> that was a small burden. Padilla was captured in Chicago, a city within the battlefield that the government asserts is the whole United States.<sup>148</sup> The court was not persuaded by this argument.<sup>149</sup>

<sup>142</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 708, 710 (2d Cir. 2003) (affirming district court's findings that personal jurisdiction was appropriate and that Secretary Rumsfeld was properly before the court), *rev'd* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see also Jeffrey R. Babbin, Erika L. Amarante, Victor A. Bolden & Gates Garrity Rokous, *Developments in the Second Circuit: 2003-2004*, 37 CONN. L. REV. 963, 979 (2005) (noting Second Circuit's holding).

<sup>143</sup> Taylor, *supra* note 95, at 28. The government argument reads as follows: With respect, the al Qaeda made the battlefield the United States, and there's substantial evidence that they're trying to make the battlefield the United States again. So when we see somebody in the United States, given the locus of the attacks to date, the locus of where future attacks are planned, it would seem to be an odd view indeed—the authority is fine if we can capture somebody over in Afghanistan, but we can't use the same basis in authority here.

Taylor, *supra* note 95, at 29 n.56 (quoting Transcript of Oral Argument at 89, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (No. 03-2235)).

<sup>144</sup> 316 F.3d 450 (4th Cir. 2003); see Taylor, *supra* note 97, at 29 (positing that government's "battlefield" argument was fashioned with an eye on satisfying the Fourth Circuit's test in *Hamdi* rather than as an appeal to the panel's sensitivities).

<sup>145</sup> *Hamdi*, 316 F.3d at 476.

<sup>146</sup> *Hamdi*, 316 F.3d at 476; see Taylor, *supra* note 97, at 29 (recounting Fourth Circuit's standard).

<sup>147</sup> See *Hamdi*, 316 F.3d at 461 (noting Hamdi's capture in Afghanistan was beyond dispute); see also Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 468 n.104 (2005) (summarizing Fourth Circuit's holding).

<sup>148</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003) (recounting Padilla's capture and detention), *rev'd* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see also Taylor, *supra* note 97, at 28–29 (recounting exchange at oral argument before Second Circuit between government counsel and the appellate judges as to the United States' status as a "battlefield").

<sup>149</sup> See *Padilla*, 352 F.3d at 711 (distinguishing Hamdi's "battlefield capture" with Padilla's "domestic arrest"); see also Carl Tobias, *Punishment and the War on Terrorism*, 6 U. PA. J. CONST. L. 1116, 1157 n.235 (2004) (noting Second Circuit's denomination of Padilla's detention as result of "domestic arrest").

Rejecting the Fourth Circuit's ruling in *Hamdi*, and reversing the Southern District on the merits, the Second Circuit ruled that the president lacked the Constitutional authority to detain a United States citizen taken into custody in the United States on these grounds, and ordered Padilla's release.<sup>150</sup> Under this holding the government would have to either charge Padilla with a criminal offense or detain him on a material witness warrant.<sup>151</sup> 'Enemy combatant' status alone was not sufficient.<sup>152</sup>

The separation of powers argument that worked for the government in *Hamdi* in the Fourth Circuit was rejected by the Second Circuit, which concluded, using a different approach to separation of powers analysis, that while Congress may provide the authority to detain United States citizens such as Padilla, the President, acting alone, may not.<sup>153</sup> Furthermore, unlike the Fourth Circuit, the Second Circuit distinguished *Quirin*.<sup>154</sup> The court found no authority to detain Padilla without Congressional authorization, stating that such authority was neither found in 18 U.S.C. § 4001(a) nor in Public Law 107-40, and, determined, in light of legislative history, that Congress proceeded by way of a resolution, not a declaration of war, to avoid suspending citizens' civil liberties.<sup>155</sup>

<sup>150</sup> See *Padilla*, 352 F.3d at 721 (holding that absent Congressional authorization President lacked "inherent constitutional authority" to detain American citizen seized in the United States as an enemy combatant); see also Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397, 1433-34 (2004) (summarizing court's holding).

<sup>151</sup> See *Padilla*, 352 F.3d at 724 (citing grounds for Padilla's putative civilian detention); see also Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173, 1217 (2004) (reiterating Second Circuit's instructions).

<sup>152</sup> See *Padilla*, 352 F.3d at 724 (finding deficiency in President's intrinsic constitutional authority to order detention based solely on "enemy combatant" designation); see also Dolin, *supra* note 114, at 631 n.64 (2005) (stating Second Circuit's holding).

<sup>153</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 715 (2d Cir. 2003) (finding paucity of authority in President's Article II powers to authorize said detention absent Congressional authorization), *rev'd* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); Cass R. Sunstein, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: National Security, Liberty and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 705 (2005) (noting Second Circuit's rejection of notion that President possessed inherent authority under Article II to detain Padilla).

<sup>154</sup> See *Padilla*, 352 F.3d at 715-17 (noting, *inter alia*, that in contrast to *Padilla*, *Quirin* "rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war"); Iijima, *supra* note 138, at 137 n.164 (summarizing Second Circuit's treatment of *Quirin*).

<sup>155</sup> See *Padilla*, 352 F.3d at 699 (finding no such authorization in Congress's Authorization for Use of Military Force Joint Resolution passed in the wake of the September 11th attacks); see also Owen Fiss, *The State as an Instrument of Justice: In the*

The language used by the Second Circuit is refreshing in the wake of the Fourth Circuit's holding in *Hamdi*. The Supreme Court, however, avoided answering Padilla's challenge to the President's authority to detain a United States citizen on the basis of enemy combatant designation.<sup>156</sup> Instead, the Court reversed the Second Circuit and held that the Southern District lacked jurisdiction to adjudicate Padilla's habeas petition.<sup>157</sup> In doing so, the Court again bypassed the opportunity to expand on the holding of *Hamdi* and curtail the Executive's ability to indefinitely detain those it designates enemy combatants without providing a justification for such status.<sup>158</sup>

Although the Supreme Court narrowly curtailed Executive power in *Hamdi*, in both *Hamdi* and *Padilla* the Court declined to establish a definitive constitutional course of conduct for the Executive regarding the constitutional rights of enemy combatants.<sup>159</sup> The Court was almost presented a third opportunity in the case of a man who, of those defendants discussed here, is seemingly the most intimately linked with the September 11 terrorist attacks.

#### *D. Zacarias Moussaoui*

In mid-August 2001, Zacarais Moussaoui, a Moroccan with French citizenship, was arrested for an immigration violation.<sup>160</sup>

*Shadow of War*, 58 U. MIAMI L. REV. 449, 463 (2003) (noting Second Circuit's interpretation of the Joint Resolution).

<sup>156</sup> See *Padilla*, 542 U.S. 426, 430 (2004) (refusing to respond to raised issue of whether President had a constitutional right to detain Padilla); see also Erwin Chemerinsky, *Wartime Security and Constitutional Liberty: Detainees*, 68 ALB. L. REV. 1119, 1125 (2005) (acknowledging how Supreme Court failed to respond to enemy combatants issue).

<sup>157</sup> See *Padilla*, 542 U.S. at 430 (stating that Padilla did not file his habeas petition in proper jurisdiction); see also Chemerinsky, *supra* note 156, at 1124-25 (reiterating Supreme Court's ruling).

<sup>158</sup> See Chemerinsky, *supra* note 156, at 1125 (explaining that Supreme Court still must attend to procedural issues regarding detainees); see also Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 A.J.I.L. 686, 688 (2004) (reflecting on Executive power to detain persons indefinitely after the *Hamdi* and Guantanamo cases).

<sup>159</sup> See Franck, *supra* note 158, at 688 (commenting on Supreme Court's decision not to address procedural problems for detainees); see also David D. Coron & Jenny S. Martinez, *International Decision: Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror*, 98 A.J.I.L. 782, 785 (2004) (explaining *Hamdi* decision in connection with U.S. and international law).

<sup>160</sup> See *U.S. v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004) (stating reason for Moussaoui's arrest); see also Sarah Downey, *Who is Zacarias Moussaoui?*, MSNBC.com,

Less than a month later, in the brutal September 11 attacks, four commercial airliners were hijacked with five terrorists on three planes but only four on the last.<sup>161</sup> The federal government indicted Moussaoui in December 2001, alleging that Moussaoui was present at an al Qaeda training camp in April 1998, arrived in the United States in February 2001, and shortly thereafter began taking flight instructions.<sup>162</sup> Moussaoui was dubbed the alleged “20<sup>th</sup> hijacker”<sup>163</sup> and charged with conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to commit aircraft piracy,<sup>164</sup> conspiracy to destroy aircraft,<sup>165</sup> conspiracy to use weapons of mass destruction,<sup>166</sup> conspiracy to murder U.S. employees,<sup>167</sup> and conspiracy to destroy property.<sup>168</sup> Some of these crimes are punishable by death.<sup>169</sup>

In defending against these charges, Moussaoui sought to call as witnesses three members of al Qaeda who were captured in the U.S.’s military campaign in Afghanistan and who are currently detainees in U.S. military custody.<sup>170</sup> Moussaoui asserted that one of these detainees, named “Witness A” for

Dec. 14, 2001, <http://msnbc.msn.com/id/3067363> (stating that Moussaoui was detained by the FBI due to immigration charges).

<sup>161</sup> *Moussaoui*, 382 F.3d at 457 (noting incidents of September 11, 2001); Frank Dunham, *Constitutionalism and the War on Terror: Hamdi Meets Moussaoui in the War on Terror*, 53 DRAKE L.

REV. 839, 847 (2005) (commenting on the breakdown of hijackers in 9/11 attacks).

<sup>162</sup> *Moussaoui*, 382 F.3d at 457 (explaining Moussaoui’s training and preparation for 9/11 attacks). See Downey, *supra* note 160 (noting how Moussaoui learned to fly airplanes).

<sup>163</sup> See Dunham, *supra* note 161, at 847 (referencing to Moussaoui as the 20th hijacker); see also Downey, *supra* note 160 (naming Moussaoui as the 20th hijacker).

<sup>164</sup> See 49 U.S.C.A. § 46502(2) (2005) (explaining elements of the offense); see also *Moussaoui*, 382 F.3d at 457 (listing Moussaoui’s charges).

<sup>165</sup> See 18 U.S.C.A. §§ 32(a)(7) (2006) (explaining elements of the offense); see also *U.S. v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004) (listing Moussaoui’s charges).

<sup>166</sup> See 18 U.S.C.A. § 2332a (a) (2006) (explaining elements of the offense); see also *Moussaoui*, 382 F.3d at 457 (listing Moussaoui’s charges).

<sup>167</sup> See 18 U.S.C.A. §§ 1114, 1117 (2006) (explaining elements of the offense); see also *Moussaoui*, 382 F.3d at 457 (listing Moussaoui’s charges).

<sup>168</sup> See 18 U.S.C.A. § 844(f) (2006) (explaining elements of the offense); see also *Moussaoui*, 382 F.3d at 457 (listing Moussaoui’s charges).

<sup>169</sup> See *Moussaoui*, 382 F.3d at 457 (stating government’s demand of death penalty for six offenses); see also Dunham, *supra* note 98, at 164 (acknowledging Moussaoui’s case as one with the death penalty).

<sup>170</sup> See *U.S. v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004) (stating that defense witnesses were captured during efforts to expunge al Qaeda); see also Dunham, *supra* note 98, at 165 (explaining government’s refusal to produce ‘material witnesses’ labeled as enemy combatants on behalf of the defendant).

security purposes, would be an important part of his defense.<sup>171</sup> This motion was accompanied by a motion seeking pretrial access to Witness A and a writ of habeas corpus ad testificandum in order to obtain trial testimony from Witness A.<sup>172</sup> Over the Government's objection, the district court determined that Witness A, who had extensive knowledge of the September 11 plot, could provide material testimony in Moussaoui's defense.<sup>173</sup>

Acknowledging the government's interest in the protection of national security, the District Court for the Northern District of Virginia, where Moussaoui was held, denied Moussaoui's motion for unmonitored pretrial access and refused to order the production of Witness A for trial.<sup>174</sup> The government's national security interest, however, was not sufficient to deny Moussaoui his constitutional right to a fair trial.<sup>175</sup> The court issued an order pursuant to Federal Rule of Criminal Procedure 15<sup>176</sup> preserving Witness A's testimony for a deposition for trial.<sup>177</sup> Respecting the government's national security interest, the court ordered that the deposition be taken by a remote video<sup>178</sup> and refused to provide access to Witness A for the purpose of a deposition.<sup>179</sup> The same conflict arose with regard to two other witnesses in military custody, Witnesses B and C.<sup>180</sup> The court submitted that Moussaoui had adequately demonstrated that the desired witnesses could provide testimony that a reasonable juror could believe and would therefore preclude him from being eligible for the death penalty.<sup>181</sup> Additionally, reasoning that the

<sup>171</sup> See *Moussaoui*, 382 F.3d at 458 (describing defendant's necessity for access to 'Witness A'); see also Dunham, *supra* note 98, at 174 (demonstrating that Moussaoui proved materiality burden of witnesses).

<sup>172</sup> See *Moussaoui*, 382 F.3d at 458 (stating the motions filed by standby counsel representing Moussaoui); see also Dunham, *supra* note 161, at 849 (stating that standby counsel was still making motions to get access to 'material witnesses').

<sup>173</sup> See *Moussaoui*, 382 F.3d at 458 (noting that "in particular, the court determined that Witness A had extensive knowledge of the September 11 plot and that his testimony would support Moussaoui's claim that he was not involved in the attacks").

<sup>174</sup> *Id.* (explaining the court's reasons in further detail).

<sup>175</sup> *U.S. v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004) (stating that "the Government's national security interest must yield to Moussaoui's right to a fair trial").

<sup>176</sup> See FED. R. CRIM. P. 15 (a) (1) (allowing a court to order a deposition of a witness to preserve testimony at trial "because of exceptional circumstances and in the interest of justice").

<sup>177</sup> See *Moussaoui*, 382 F.3d at 458–59 (explaining preservation process).

<sup>178</sup> *Id.* at 458 (explaining that Witness A would be in an undisclosed location).

<sup>179</sup> *Id.* at 459 (noting the refusal).

<sup>180</sup> *U.S. v. Moussaoui*, 382 F.3d 453, 459 (4th Cir. 2004) (explaining similar conflicts).

<sup>181</sup> *Id.* at 459–60 (noting court's reasoning).

desired witnesses' testimony could potentially exonerate him from the attacks, and that a conviction did not necessitate proof of involvement with the September 11 plot, the court prohibited the government from offering evidence or suggesting that Moussaoui had involvement in or knowledge of the September 11 scheme.<sup>182</sup>

Ultimately, the district court granted access, with modifications for the purpose of national security, to witnesses A, B, and C for depositions pursuant to Federal Rule of Criminal Procedure 15, rejected the Government's proposed substitutions for the depositions, and ordered sanctions for the Government's refusal to produce the witnesses.<sup>183</sup> The case was appealed to the Fourth Circuit, which recognized the "questions of grave significance—questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks."<sup>184</sup> Ultimately the Fourth Circuit confirmed the district court's authority in granting Moussaoui access to the witnesses, and affirmed that the Government's proposed substitutions for depositions were inadequate. However, the Fourth Circuit reversed the District Court's imposition of sanctions on the Government for failure to produce the witnesses.<sup>185</sup>

The Government asserted that the Executive's interest in war making should preclude the judiciary's order of production of the witnesses.<sup>186</sup> Furthermore, the Government argued that because District Courts cannot compel the government to grant immunity to witnesses, they likewise are incapable of compelling the government to produce witnesses.<sup>187</sup> The argument set forth by the government mirrors the separation of powers argument that persuaded the Fourth Circuit in *Hamdi*.<sup>188</sup> Luckily, in *Moussaoui*,<sup>189</sup> the Fourth Circuit was less receptive to the

<sup>182</sup> *Id.* at 459–60 (stating reasons for the prohibition).

<sup>183</sup> *Id.* at 461 (noting court's decision).

<sup>184</sup> *Id.* at 456 (explaining why court reversed).

<sup>185</sup> *U.S. v. Moussaoui*, 382 F.3d 453, 456 (4th Cir. 2004) (explaining Executive's interest in war).

<sup>186</sup> *Id.* at 466 (noting Government's arguments).

<sup>187</sup> *Id.* at 466–67.

<sup>188</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

<sup>189</sup> *Moussaoui*, 382 F.3d at 453.



separation of powers argument and outright rejected the government's comparison of compelled witnesses to compelled immunity.<sup>190</sup>

Moussaoui was charged with heinous acts of violence against the United States. Furthermore, he has exhibited utter disrespect for this country and our legal system throughout his trial.<sup>191</sup> While submitting motions *pro se*, Moussaoui referred to the "greatest 9/11 operation" and the "dark house" instead of the White House.<sup>192</sup> Furthermore, he often submitted motions and other court documents referring to the presiding District Judge, Leonie Brinkema, as "Lie-oni,"<sup>193</sup> and used such titles as "Motion to Get Time Out Added In the Dirty Game of U.S."<sup>194</sup> and "Motion to Counter Dirty Insider Dealing by Fat Megalo Dunham for his Chief Pay Persecution Master Ashcroft (a/k/a United Satan Chief Liar) and to Have Fat Megalo Out of 9/11 Circus Trial."<sup>195</sup> Nonetheless, Moussaoui is entitled to the same constitutional rights as any other criminal defendant and if his civil liberties are denied, the stability of the system will be jeopardized.<sup>196</sup>

Moussaoui's case seemed to present the Supreme Court with the perfect opportunity to affirm the Fourth Circuit's ruling and

<sup>190</sup> U.S. v. Moussaoui, 382 F.3d 453, 466–68 (4th Cir. 2004) (explaining why the comparison did not work).

<sup>191</sup> See Motion by Zacarias Moussaoui to Intercept Pro Se Attorney Privileged Mail to the Court of Appall (Apr. 23, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68578/1.pdf> (referring to the United States as the "United Satan of America"); see also Dunham, *supra* note 20, at 30 (calling Moussaoui 'clever' with his use of words to disrespect the American legal system).

<sup>192</sup> See Motion by Zacarias Moussaoui to Force Fat Megalo Dunham to Submit to Death, (Apr. 21, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68546/1.pdf> (representing himself, Moussaoui filed multiple motions that disrespected the American judicial system).

<sup>193</sup> See Motion by Zacarias Moussaoui to Expose Lieonie Brinkema (Apr. 23, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68581/1.pdf>.

<sup>194</sup> See Motion by Zacarias Moussaoui to Get Time Out Added In the Dirty Game of U.S. (Sept. 12, 2002), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/67377/1.pdf>.

<sup>195</sup> See Motion by Zacarias Moussaoui to Counter Dirty Insider Dealing by Fat Megalo Dunham for his Chief Pay Persecution Master Ashcroft (May 12, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68749/1.pdf>.

<sup>196</sup> See *United States v. Moussaoui*, 382 F.3d 453, 482 (2004) (stating need to provide method to protect defendant's Constitutional rights); see also A. John Rasdan, *Criminal Law in Minnesota: The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1433 (2005) (highlighting that although the Fourth Circuit had questioned the scope of Moussaoui's Constitutional rights, the existence of his rights was never in question).

emphasize concretely that the Executive Branch does not have carte blanche when it attempts to jeopardize the constitutional rights of the accused, even when preserving an interest as important as national security and even when the accused is as offensive as Moussaoui.<sup>197</sup> However, the Supreme Court will not get this opportunity to review the Fourth Circuit's holding because Moussaoui pled guilty to the charges against him without any exchange promise of leniency from the government.<sup>198</sup> The plea was accepted on April 22, 2005 and whether or not he will be executed is currently being decided by a jury in Alexandria, Virginia.<sup>199</sup>

#### CONCLUSION: PREVENTING A REPETITION OF HISTORY

Much concern has been expressed regarding the current Executive branch and recent attempts to increase Executive power at the expense of civil liberties. While some judicial deference to the Executive is justifiable in a time of military crisis, it is essential that the judiciary keep in mind that the current war is different from the traditional wars in our history.<sup>200</sup> The "War on Terror" is an international war without a specific enemy and with no end in sight. Many of the current Administration's critics point to the Patriot Act, enacted shortly

<sup>197</sup> See *Moussaoui*, 382 F.3d at 482 (holding that even Moussaoui was entitled to protection of his civil liberties); see also Rasdan, *supra* note 196, at 1433 (noting that the government has not been able to convince the court to deny Moussaoui his Constitutional rights to produce witnesses).

<sup>198</sup> See Michael C. Dorf, *Why Al Qaeda Conspirator Zacarias Moussaoui's Guilty Plea Probably Won't Save His Life*, FINDLAW, Apr. 27, 2005, <http://writ.news.findlaw.com/dorf/20050427.html> (suggesting that a guilty plea will not be sympathetic to a jury); see also Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. TIMES, Apr. 23, 2005, at A1 (reporting Moussaoui pled guilty to conspiracy in a terrorist plot).

<sup>199</sup> See *Moussaoui Pleas Guilty to Terror Charges*, CNN.com, Apr. 23, 2005, <http://www.cnn.com/2005/LAW/04/22/moussaoui/> (discussing Moussaoui's guilty plea); see also Jerry Markon, *Moussaoui Trial Offers Close View for Some; 500 Prospective Jurors to Receive Summonses*, WASH. POST, Dec. 29, 2005, at T01 (stating that Virginia officials plan to summons five hundred people as prospective jurors).

<sup>200</sup> See Scheindlin, *supra* note 37, at 796 (noting that this war is 'different'); see also Melissa K. Matthews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455, 456 (2002) (referring to the war on terrorism as both "extraordinary times" and a "new kind of war").

after September 11, as evidence of this attempt to increase executive power<sup>201</sup>.

After the September 11 attacks, President Bush presented the Patriot Act to Congress. The bill was debated in Congress for thirty minutes and was approved in the Senate by all but one vote.<sup>202</sup> Critics of the Patriot Act point to it as evidence of the President's attempt to enlarge his authority and even as a means to establish an "imperial presidency."<sup>203</sup> Essentially, the Patriot Act enhances the Executive's surveillance powers, giving federal agents the authority to obtain personal records and conduct searches and seizures of homes or offices without notice.<sup>204</sup> The Act illustrates increasing Executive power at the expense of civil liberties integral to the American conception of freedom and emphasizes the need for the Court to confine Executive authority to its constitutional limits.

*Moussaoui* was not the last opportunity for the Court to issue a holding that imposes limits on the Executive's authority as Commander in Chief. Indeed, the most recent rulings regarding detainees incarcerated at the United States naval base in Guantanamo Bay, without access to tribunals or even charges brought against them, have been remanded to the district courts to consider the merits of their habeas corpus claims.<sup>205</sup>

The judiciary is by no means a weak and impotent branch of government as intended by the Founders, and many of its

<sup>201</sup> See Scheindlin, *supra* note 37, at 843 (discussing enhanced executive powers granted by the Patriot Act); see also Matthews, *supra* note 200, at 458 (noting that the Patriot Act grants new tools to the Executive Branch).

<sup>202</sup> See Matthews, *supra* note 200, at 474 (noting that only one senator voted against the Patriot Act); see also Scheindlin, *supra* note 37, at 842-43 (stating that the Patriot Act was passed after only six weeks following September 11).

<sup>203</sup> See Matthews, *supra* note 200, at 456 (noting that critics suggest President Bush intends to continue to expand Executive power); see also Burns H. Weston, Symposium, *International Sanctions Against Iraq: Where are we After Ten Years? Living History Interview with Bessie Dutton Murray Distinguished Professor of Law Emeritus and Director of the University of Iowa Center for Human Rights*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 431, 449 (2001) (discussing the expansion of executive power).

<sup>204</sup> Uniting and Strengthening America by Providing Appropriate Tools required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272, 213 (2001); see Matthews, *supra* note 200, at 458 (specifying the expansion of Executive power granted by the Patriot Act).

<sup>205</sup> See *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (ruling decided and reported together with *Al Odah v. United States*); see also Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 371 (2005) (suggesting that this line of cases will lead to further assessments of the bounds of executive authority).

decisions have shaped the law and society of the nation.<sup>206</sup> Equipped with this power, it is imperative that the Court establish a clear and authoritative message to the Executive, demanding process for the accused and recognition of their Constitutional rights. Protecting the safety of the nation and securing it from future terrorist attacks is undoubtedly a priority for the Executive, as well as for the other two branches of government. This goal, however, can and must be achieved without jeopardizing the rights of the criminally accused. It is up to the Court to mandate that the Executive act within the confines of the Constitution when seeking to protect those liberties the Constitution was designed to secure.

<sup>206</sup> See, e.g., *Brown v. Board of Education*, 349 U.S. 294 (1955) (holding that discrimination based on race in public schools is unconstitutional); *Roe v. Wade*, 410 U.S. 959 (1973) (holding that women have a constitutional right to an abortion).

